

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Bright House Networks, LLC)	
)	CSR 6132-E
Petition for Determination of Effective)	
Competition in Various Florida Communities)	

MEMORANDUM OPINION AND ORDER

Adopted: February 28, 2007**Released: March 2, 2007**

By the Deputy Chief, Policy Division, Media Bureau:

I. INTRODUCTION

1. Bright House Networks, LLC ("Bright House") has filed with the Commission a petition pursuant to Sections 76.7 and 76.905(b)(1) & (2) and 76.907 of the Commission's rules seeking a finding of effective competition in five franchise areas in Florida (the "Communities").¹ Bright House alleges that its cable system serving four of the Communities is subject to effective competition pursuant to Section 623(a)(1) of the Communications Act of 1934, as amended ("Communications Act")² and therefore exempt from cable rate regulation because of competing service provided by two direct broadcast satellite ("DBS") providers, DirecTV, Inc. ("DirecTV") and DISH Network ("DISH"). Oppositions were filed by Polk County and Haines City, to which Bright House replied. Bright House also alleges that its Lake Wales franchise area is subject to effective competition based on the low penetration effective competition test.

2. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition,³ as that term is defined by Section 76.905 of the Commission's rules.⁴ The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition is present within the relevant franchise area.⁵

II. DISCUSSION**A. Competing Provider Effective Competition**

¹See 47 C.F.R. §§ 76.7(a)(1) and 76.905(b)(1) & (2). The communities are Davenport (FL0115), Haines City (FL0120), Lake Hamilton (FL0121), Lake Wales (FL1240), and unincorporated Polk County (FL0045, FL0152, FL0259, FL0290, FL0362, FL0666, FL0904, FL0981, FL1042, FL1122, FL1123, FL1126). Bright House also requested that the Commission revoke Polk County's certification to regulate basic service rates, however, Commission records do not indicate that Polk County was certified to regulate basic service rates.

²See 47 U.S.C. § 543(a)(1).

³47 C.F.R. § 76.906.

⁴47 C.F.R. § 76.905.

⁵See 47 C.F.R. §§ 76.906 & 907.

3. Section 623(l)(1)(B) of the Communications Act provides that a cable operator is subject to effective competition if the franchise area is (a) served by at least two unaffiliated multi-channel video programming distributors (“MVPD”) each of which offers comparable video programming to at least 50 percent of the households in the franchise area; and (b) the number of households subscribing to programming services offered by MVPDs other than the largest MVPD exceeds fifteen percent of the households in the franchise area.⁶ Turning to the first prong of the competing provider test, DBS service is presumed to be technically available due to its nationwide satellite footprint, and presumed to be actually available if households in a franchise area are made reasonably aware that the service is available.⁷ Bright House has provided evidence of the advertising of DBS service in the news media serving the Communities.⁸ The two DBS providers’ subscriber growth reached approximately 26.1 million as of June 2005, comprising approximately 27.7 percent of all MVPD subscribers nationwide; DirecTV has become the second largest, and DISH the third largest, MVPD provider.⁹ In view of this DBS growth data, and the data discussed below showing that more than 15 percent of the households in the communities listed on Attachment A are DBS subscribers, we conclude that the population of the communities at issue here may be deemed reasonably aware of the availability of DBS services for purposes of the first prong of the competing provider test.

4. With respect to the issue of program comparability, we find that the programming of the DBS providers satisfies the Commission’s program comparability criterion because the DBS providers offer at least 12 channels of video programming, including at least one non-broadcast channel.¹⁰ We find that Bright House has demonstrated that the Communities are served by at least two unaffiliated MVPDs, namely the two DBS providers, each of which offers comparable video programming to at least 50 percent of the households in the Communities. Bright House also demonstrated that the two DBS providers are physically able to offer MVPD service to subscribers in the Communities, that there exists no regulatory, technical, or other impediments to households within the Communities taking the services of the DBS providers, and that potential subscribers in the Communities have been made reasonably aware of the MVPD services of DirecTV and DISH. Accordingly, we find that the first prong of the competing provider test is satisfied.

5. The second prong of the competing provider test requires that the number of households subscribing to MVPDs, other than the largest MVPD, exceeds 15 percent of the households in a franchise area. Bright House asserts that it is the largest MVPD in the four Communities.

6. Bright House derived the DBS franchise area subscribership based on an allocation methodology previously approved by the Commission.¹¹ Bright House initially determined the number of households in each franchise area based on data from the 2000 Census.¹² Bright House then derived an allocation ratio by dividing the 2000 Census household figure by the SkyTrends’ aggregate household figure for the five digit zip code area covering all or part of the franchise area.¹³ Bright House also

⁶47 U.S.C. § 543(1)(1)(B); see also 47 C.F.R. § 76.905(b)(2).

⁷See *MediaOne of Georgia*, 12 FCC Rcd 19406 (1997).

⁸See Bright House Petition at 4-5 and Exhibit A.

⁹*Twelfth Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming*, FCC 06-11 at ¶¶ 6, 13, 72-73 (rel. March 3, 2006).

¹⁰See 47 C.F.R. § 76.905(g). See also Bright House Petition at 6-7 and Exhibit B.

¹¹Bright House Petition at 9-10; see, e.g., *In re Petition for Determination of Effective Competition in San Luis Obispo County, California*, 17 FCC Rcd 4617 (2002); *Fibervision, Inc. Petition for Determination of Effective Competition in Laurel, MT and Park City, MT*, 17 FCC Rcd 16313 (2002).

¹²Bright House Petition at 10 and Exhibit D.

¹³*Id.* and Exhibits E, F, and G.

obtained the number of DBS subscribers for each franchise area from SkyTrends and that figure was reduced by 2 percent to account for commercial or test accounts.¹⁴ The reduced DBS subscriber count was then multiplied by the allocation ratio to determine the number of DBS subscribers allocable to the Franchise Area, which was then divided by the 2000 Census household total to derive the total DBS subscribership.¹⁵

7. Polk County and Haines City filed oppositions alleging that Bright House has not met its burden of demonstrating that the number of households subscribing to DBS providers exceeds 15 percent of the households in their respective communities. Initially, Polk County and Haines City question the SkyTrends zip code identification methodology because it includes zip codes that are not in the franchise area as well as data from other municipalities.¹⁶ Polk also questions the use of the SkyTrends Report because there is no author's affidavit and no company representative has verified the accuracy of the report.¹⁷ Polk alleges that Bright House has failed to satisfy the Commission's requirement that the petition's factual representations are reliable because it relies on declarations of its' attorneys and Vice President of Marketing and Programming although there is nothing in the record to reflect their involvement in the production of the Report.¹⁸ Polk also alleges that zip codes 33803, 33805, 33838, 33839, 33850, 33859, 33896, 33897, and 33898 are entirely within neighboring jurisdictions and are not in the Polk County franchise area.¹⁹ Polk further alleges that zip code 33881 is primarily within the city limits of Winter Haven.²⁰ Polk argues that Bright House should have used Polk County Property Appraiser's records to determine both the number of households in the unincorporated portion of Polk County and the relevant zip codes, which would have resulted in the use of only a limited portion of the data.²¹ Polk also argues that Bright House's use of a 2 percent adjustment factor for commercial subscribers is insufficient because it fails to properly account for dual receivers, cable and DBS homes, and test accounts.²² Finally, Polk argues that a growth factor should have been applied to the U.S. Census figures.²³

8. Haines City alleges that Bright House used incomplete data to support its argument that the 15 percent DBS penetration threshold has been met. Moreover, Haines City claims that it is unable to evaluate the accuracy of Bright House's assertion that the 15 percent DBS penetration rate has been met due to the incomplete nature of the statistical data submitted by Bright House.²⁴

9. In reply, Bright House argues that the Commission has previously held in numerous proceedings that SkyTrends' data is acceptable for purposes of demonstrating effective competition.²⁵ Bright House asserts that the Commission has held under Section 76.907(c) of its rules that cable operators may request subscriber information from competitors for the purposes of effective competition,

¹⁴*Id.*

¹⁵*Id.* and Exhibit F and G.

¹⁶Polk County Opposition at 2; Haines City Opposition at 2-7.

¹⁷Polk County Opposition at 3.

¹⁸*Id.*

¹⁹*Id.* at 3-4.

²⁰*Id.* at 4.

²¹*Id.* at 5.

²²*Id.* at 5-6.

²³*Id.* 6-7.

²⁴Haines City Opposition at 3-4.

²⁵Bright House Reply at 3-4.

however, that information may be limited to numerical totals.²⁶ Thus, cable operators are not required to verify the information obtained from SkyTrends.²⁷ Bright House notes that the Commission has never required SkyTrends data to be verified, nevertheless, Bright House's Reply contains a letter from a SkyTrends' project manager vouching for the accuracy of the data and explaining that the data comes directly from the DBS providers and is only aggregated by SkyTrends.²⁸ Bright House also argues that the zip codes used in the petition demonstrate the existence of effective competition in unincorporated Polk County.²⁹ Bright House further asserts that SkyTrends identified the zip codes contained in the Report as covering at least a portion of the franchise area (unincorporated Polk County) using sophisticated mapping software based on data derived from the U.S. Census Bureau and U.S. Postal Service to identify all of the 5-digit zip codes that encompass the Franchise Area in whole or part and this process is detailed in Exhibit E to its Petition.³⁰ Thus, there is no reason to exclude this data from the penetration calculation. Bright House further contends that even if all of the zip codes challenged by Polk County are excluded, DBS penetration in unincorporated Polk County would still exceed 15 percent and the system is therefore subject to effective competition.³¹ Bright House further argues that the two percent adjustment used to account for commercial test accounts, dual receiver households, and test accounts is sufficient because SkyTrends has refined its procedure for collecting and reporting subscribership data.³² Finally, Bright House argues that there is no basis for adding a growth factor to the 2000 U.S. Census Bureau household data since the Commission has stated that the 2000 Census household figure is the only relevant factor, but even if the proposed 3.8 percent growth factor was added, DBS penetration would still exceed 15 percent.³³

10. We reject Polk County's and Haines City's challenge to the methodology of the SkyTrends Report. The Commission has repeatedly accepted SkyTrends' subscriber reports on behalf of the DBS providers in satisfaction of Section 76.907(c) of the Commission's rules.³⁴ Pursuant to this provision, cable operators may request subscriber information from competitors for effective competition purposes, however, this information may be limited to numerical totals.³⁵ Bright House provided the Communities with the SkyTrends report identifying the total number of DBS subscribers allocated to the franchise areas, as well as a copy of the methodology detailing how SkyTrends reached this result.³⁶ We otherwise find no basis to question the overall reliability of the SkyTrends' Report. With regard to the zip codes that Polk challenges as not being in the franchise area at all, Bright House has presented evidence to support its contention that even if you exclude those nine zip codes, the DBS provider penetration will still exceed 15 percent penetration.³⁷ We further reject the City's challenge to the 2 percent adjustment factor for commercial subscribers. While the City is correct in arguing that SkyTrends has previously

²⁶*Id.* at 3.

²⁷*Id.* at 4.

²⁸*Id.*

²⁹*Id.* at 5-6.

³⁰*Id.*

³¹*Id.*

³²*Id.* at 7-8.

³³*Id.* at 8-9.

³⁴*See In the Matter of Cablevision of Raritan Valley, Inc. et al.*, 19 FCC Rcd 6966, 6968 (2004); *In the Matter of Adelphia Cable Communications*, 20 FCC Rcd 4979, 4982 (2005); *In the Matter of MCC Iowa LLC*, 2005 WL 2513517 (2005).

³⁵47 C.F.R. § 907(c).

³⁶Petition at 8-9 and Exhibit E; Reply 1-7 and Exhibit A.

³⁷Reply at 6.

adjusted subscriber counts by as much as 15 percent in DBS subscribership reports, that adjustment factor has since been reduced due to refinements by SkyTrends in its reporting and its recommended reduction is now 2 percent.³⁸

11. Finally, we reject Polk County's challenge to the use of the 2000 Census data figures as outdated. We have consistently held that the 2000 Census data is sufficiently reliable for effective competition determinations in numerous proceedings.³⁹ Nevertheless, the Commission has indicated that it "will accept more recent household data that is demonstrated to be reliable."⁴⁰ Polk County states that we should use County Property Appraiser's records which are public, although it offers no reason why these numbers are more reliable. For example, we are unable to confirm that the County Appraiser's records reflect only households, which consist of occupied housing units, rather than both occupied and unoccupied housing units. The competing provider test for effective competition set forth in Section 623(l)(1)(B) of the Communications Act expressly instructs the Commission to evaluate effective competition on the basis of "households."⁴¹ We will rely on the Census 2000 data. Attachment A now reflects household data from the 2000 Census and excludes the zip codes challenged by Polk County. It does not, however, include any adjustments to the 2000 Census household numbers such as Bright House's proposed 3.8 percent growth factor.

12. Bright House asserts that it is the largest MVPD in the four Communities because Bright House's subscribership exceeds the aggregate DBS subscribership for those franchise areas.⁴² Based upon the aggregate DBS subscriber penetration levels, as reflected in Attachment A, calculated using Census 2000 household data,⁴³ we find that Bright House has demonstrated that the number of households subscribing to programming services offered by MVPDs, other than the largest MVPD, exceeds 15 percent of the households in the Communities. Therefore, the second prong of the competing provider test is satisfied as to the Communities. Based on the foregoing, we conclude that Bright House has submitted sufficient evidence demonstrating that its cable systems serving the Communities are subject to effective competition.

B. Low Penetration Effective Competition

13. Section 623 (l)(1)(A) of the Communications Act provides that a cable operator is subject to effective competition, and therefore exempt from cable rate regulation, if "fewer than 30 percent of the households in the franchise area subscribe to the cable service of the cable system."⁴⁴ Bright House's Lake Wales franchise area listed on Attachment B provided information showing that less than 30 percent of the households within its franchise area subscribe to its cable service. Based on this record, we conclude that Bright House has demonstrated the existence of low penetration effective competition under our rules.

³⁸*Id.* at 7 and Exhibit A.

³⁹*In the Matter of Cablevision of Raritan Valley, Inc. et al.*, 19 FCC Rcd 6966, 6968 (2004); *In the Matter of Adelphia Cable Communications*, 20 FCC Rcd 4979, 4982 (2005); *In the Matter of MCC Iowa LLC*, 2005 WL 2513517 (2005).

⁴⁰*In the Matter of Adelphia Cable Communications*, 20 FCC Rcd 4979, 4982 (2005); *In the Matter of MCC Iowa LLC*, 2005 WL 2513517 (2005).

⁴¹47 C.F.R. § 543(l)(1)(B).

⁴²Bright House Petition at 7-9 and Exhibit E.

⁴³*Id.* at 7-10 and Exhibit G.

⁴⁴47 U.S.C. § 543(l)(1)(A).

III. ORDERING CLAUSES

14. Accordingly, **IT IS ORDERED** that the petition for a determination of effective competition filed in the captioned proceeding by Bright House Networks, LLC **IS GRANTED**.

15. **IT IS FURTHER ORDERED** that the certifications to regulate basic cable service rates granted to any of the local franchising authorities **ARE REVOKED**.

16. This action is taken pursuant to delegated authority pursuant to Section 0.283 of the Commission's rules.⁴⁵

FEDERAL COMMUNICATIONS COMMISSION

Steven A. Broeckert
Deputy Chief, Policy Division, Media Bureau

⁴⁵47 C.F.R. § 0.283.

CSR 6132-E

COMMUNITIES SERVED BY BRIGHT HOUSE NETWORKS, LLC

Communities	CUIDS	CPR*	2000 Census Households⁺	Estimated DBS Subscribers⁺
Davenport	FL0115	29.23	708	207
Haines City	FL0120	18.97	4749	901
Lake Hamilton	FL0121	18.87	482	91
Uninc. Polk County	FL0045	19.2%	112477	21594
	FL0152			
	FL0259			
	FL0290			
	FL0362			
	FL0666			
	FL0904			
	FL0981			
	FL1042			
	FL1122			
	FL1123			
	FL1126			

*CPR = Percent of competitive DBS penetration rate.

⁺See Bright House Petition at 7-10 and Exhibits G, F, and E.

Attachment B**Low Penetration Test**

Communities	Franchise Area Households	Cable Subscribers	Penetration Level
Lake Wales	4044	54	.013